Statement to the
California Performance Review

Presented by: Barbara F. Smith

Capistrano Unified School District
32972 Calle Perfecto
San Juan Capistrano, CA 92675
OFFICE: (949) 489-7432
FAX: (949) 487-5486

Madam Co-Chair Kozberg, Co Chair Hauck, CPR Commissioners, Distinguished Guests, and my fellow citizens of California:

Good morning.

My name is Barbara Smith, and I am a retired superintendent serving as a consultant for special education alternative dispute resolutions for the Capistrano Unified School District (CUSD). This school district serves 50,338 children from 12 cities and unincorporated communities in southern Orange County. Five thousand eight hundred fifty-seven CUSD children are enrolled in special education and we offer a full continuum of special education programs and services.

On behalf of our Superintendent Dr. James A. Fleming and our Board of Trustees, I am pleased to voice support of CPR's three recommendations to *Improve the Special Education Hearing and Mediation Process.*

First, we encourage the Commission and Governor to move forward with the California Performance Review (CPR) recommendation that the California Department of Education enter into a Memorandum of Understanding with the State of California's Office of Administrative Hearings (OAH) to conduct special education hearings and mediations.

The OAH currently has a core of administrative law judges who have a depth of experience in presiding over a variety of administrative hearings throughout California, including hearings for disputes arising over programs and services for disabled children and adults who are served by the Department of Developmental Services' Regional Centers throughout the State. In this capacity, the OAH has demonstrated a high degree of professionalism, consistency and effectiveness.

As you may be aware, school districts work in partnership with Regional Centers to provide a continuum of services for disabled children and their families. The experience of OAH administrative law judges with the mediations and hearings for the Department of Developmental Services forms a strong base from which to expand their expertise for similar mediations and hearings related to the educational needs of children with

disabilities. We believe that the transfer of responsibility for special education mediations and hearings to OAH would not only represent a significant direct savings to the citizens of California (CPR staff estimate of an annual $500,000), but it will also result in additional savings for both California and local school districts. The manner in which the University of the Pacific, McGeorge School of Law, currently conducts special education mediations and due process hearings has resulted in spiraling costs to local school districts, increased litigation, protracted hearings, and expensive appeals.

Over the last several years, there has been growing and widespread concern that special education due process hearings conducted by McGeorge School of Law have not been carried out in a manner consistent with federal and state law. The litany of concerns over McGeorge conduct of special education due process hearings have included, for example, introduction of new issues and evidence in violation of the statutory time lines; curtailing the ability, timing and presentation of evidence and witnesses by school parties; refusal to dismiss school entities as parties despite their lack of legal responsibility for the student; McGeorge hearing officers assuming the role of the student's "advocate" rather than conducting the hearing in a fair and impartial manner, etc. Further, there is a perception shared by many public school officials and their attorneys that McGeorge hearing officers utilize written and unwritten hearing procedures and rules which arguably constitute "underground" regulations which are not known to all parties and which have not been adopted under California's public notice and comment procedures for new regulations.

Our school district has also grown increasingly concerned over the considerable turnover in administrative hearing officers and the lack of training and experience on the part of new hearing officers. Prior to 1988, when due process hearings were conducted by administrative law judges from OAH, it was our experience that the judges exhibited a high degree of legal competence and that the hearings were conducted through the application of fair and consistent regulations and standards which were clearly understood in advance by all parties. This judicial competence reduced the amount of time necessary to conduct costly hearings; had the effect of minimizing the filing of frivolous claims and the need for expensive appeals; and reduced the amount of ill will and controversy arising out of such hearings.

If OAH were to administer due process hearings in a manner consistent with the California Administrative Procedure Act, as it did prior to 1988 when the responsibility for hearings was transferred to McGeorge, we believe the result would be that over time less public funds will be devoted to special education litigation and more funds will be available for actual services to benefit disabled children.

Second, we urge the Commission and Governor to move forward with the CPR recommendation to request that the California Department of Education increase the number of cases resolved by mediation, thereby realizing further and substantial cost savings.

Currently a large portion of the cases filed for due process in our school district are resolved through mediation, prior to a due process hearing. However, even these mediations, as currently conducted through McGeorge, usually involve attorneys and are costly in their own right. We would like to suggest two methods of decreasing the costs of mediations while increasing their potential to resolve disputes early. We recommend that:

1. The Commission and Governor request that grant funding be earmarked for school districts to establish Alternative Dispute Resolution (ADR) programs.

   Special Education ADR programs involve trained, impartial local mediators, or solutions panels, in using techniques of communication, collaboration, negotiation, and mediation to assist the parties of a dispute in finding solutions which focus on the needs of the child, are mutually agreeable, and produce sensible and lasting agreements. In school districts when ADR programs are in effect, many cases are resolved relatively quickly, before they become as adversarial as to require the more formal and legalistic due process mechanisms. Further, when disputes can be resolved at a non-adversarial level, there is greater opportunity to preserve positive home-school relationships which are so vital to supporting the child's progress.

2. The Commission and Governor request that the California Department of Education require that mandatory "mediation only" meetings take place between parents and no more than two school district representatives prior to proceeding to the more formal mediation or due process hearing.

   The current system allows for "mediation only" meetings as an option in obtaining resolution to special education disputes. Attorneys are not allowed to attend these "mediation only" meetings. It is our experience that "mediation only" meetings are cost effective, can lead to quicker, better resolutions for the child, foster better understanding among the parties, and can preserve and mend relationships between the parents, the teachers and the school.

Third, encourage the Commission and Governor to move forward with the CPR recommendation that the California Department of Education permit mediators to function as non-binding arbitrators.

Following the model of arbitrations in civil litigation, both parties should be allowed to provide the mediator/arbitrator with written summaries of the facts of the dispute and a requested resolution. During the informal mediation/arbitration preceding, each party would present their viewpoints and provide any further written documentation or evidence they wish considered. The proceeding could go forward as mediation, until and

if, the parties conclude they cannot reach an agreement. Currently, when there is no agreement in mediation, the case proceeds to a due process hearing. However, if the mediator was also able to function as a non-binding arbitrator, he or she could make a strong, informed recommendation for settlement of the case. This recommendation could provide valuable feedback to the parties as to how a hearing officer might view the case and thus motivate the parties to move toward agreement.

This approach also argues for OAH to take over the mediation and due process hearings for special education disputes. Prior to 1988, when OAH conducted special education mediations and hearings, an administrative law judge (ALJ) often conducted both the mediation and the hearing. This gave him/her great creditability at the time of the mediation. The parties understood that if the case went forward, the result would likely be similar to the resolutions suggested by the mediator. This follows the experience of civil mediations where research shows that 75% of all eventual settlements are very much the same as what was recommended in non-binding arbitration.

Many of the mediators currently employed by McGeorge do creditable and effective jobs in mediation. However, if they were to take on the role of arbitrators, a number of them would need to have more specialized training in the legal requirements of IDEA. If the program were administered by OAH, the ALJ might do the mediation/arbitration, or the mediator might work under the guidance and counsel of an ALJ.

We appreciated the opportunity to share our thoughts with you today. We commend the Governor and Commission for their thoughtful and measured approach to modernizing California's government and eliminating waste and inefficiency.

We strongly encourage this CPR Panel to include in its recommendations to the Governor that all three recommendations to *Improve the Special Education Hearing and Mediation Process* are adopted.

Thank you very much.